No. 15176

In the United States Court of Appeals

For the Ninth Circuit

MAURICE PENN,
Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Appellant's Opening Brief

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Preliminary Statement

This is an appeal by the petitioner, Maurice Penn, from an order of the Hon. Ben Harrison, entered on or about the 10th day of May, 1956, affirming the order of the Hon. Joseph J. Rifkind, Referee in Bankruptcy, made and entered on or about the 20th day of February, 1956, in favor of the trustee and against the petitioner (Tr. of Rec. p. 51) which determined that a levy of attachment issued out of the Municipal Court in that certain action entitled Maurice Penn v. L. R. Mahan on certain real property owned by the bankrupt was

void and of no effect as against the trustee in bankruptcy (Tr. of Rec. p. 25). The order of the Referee in Bankruptcy (Tr. of Rec. p. 25) is also brought up for review on this appeal (Tr. of Rec. p. 52).

Statement as to Jurisdiction

Maurice Penn commenced an action against the bankrupt, L. R. Mahan, in the Municipal Court of the City of Los Angeles, State of California, on or about the 16th day of September, 1953, and caused an attachment to be issued and levied on that certain real property described as Lot 28, in Tract No. 8970, as per map recorded in book 117, pages 43-44 of Maps, which property was owned by the bankrupt. Proceedings were commenced by the Trustee in Bankruptcy to set the said attachment aside on the grounds that it was a lien obtained by attachment within four months before the filing of the Petition in Bankruptcy by the bankrupt (Tr. of Rec. p. 17). This Court can entertain such a proceeding pursuant to §67a of the Bankruptcy Act [11 U.S.C.A. 107], and jurisdiction of this Court is based on said section.

Facts

The appellant herein, Maurice Penn, caused an attachment to be levied in Municipal Court Case No. 124,775 entitled Maurice Penn v. L. R. Mahan, on certain real property described as Lot 28, Tract 8790, as per map recorded in Book 117, pages 43-44 of Maps, Records of Los Angeles County, State of California (Finding of Fact No. II; Tr. of Rec. p. 23). An order

adjudicating L. R. Mahan as a bankrupt was entered on or about the 16th day of October, 1953 (Finding of Fact No. I; Tr. of Rec. p. 23; pp. 7-8). On the 7th day of December, 1955, the trustee filed its petition alleging that at the time of the said levy of attachment the bankrupt was actually insolvent and that by virtue of the provisions of §67a [11 U.S.C.A. 107] of the Bankruptcy Act said levy of attachment and subsequent judgment lien were void and of no effect as against either the trustee in bankruptcy or the bankrupt estate (Tr. of Rec. pp. 17-18) which allegation was duly denied by the respondent in its Answer to the Petition (Tr. of Rec. p. 19). The issues thus being framed, the sole question posed to the court was the insolvency of the bankrupt at the time of the levy of the attachment (Tr. of Rec. p. 29).

In determining the solvency of the bankrupt on the 16th day of September, 1953, consideration must be given to whether the chose in action in the sum of $81,719.61 was worth that amount.

The trustee then produced as a witness Grace Mahan, the wife of the bankrupt (Tr. of Rec. p. 29) who testified that a cause of action against the Seaboard Finance Company based on usury had been filed on September 16th, 1953, claiming damages in the total amount of $81,719.61 (Tr. of Rec. p. 36; p. 42). The witness and her husband felt that the Seaboard Finance Company was indebted to them for that amount (Tr. of Rec. p. 42; p. 43). This was the only testimony produced by the trustee to support his allegation that the

bankrupt was insolvent at the time of the levy of the attachment. The only other evidence in the record relating to the value of this chose in action was the schedules (Tr. of Rec. pp. 5-7) verified by the bankrupt as part of an accurate inventory of his property (Tr. of Rec. p. 4, Paragraph IV).

From all of this the Referee found that the alleged claim for usury in the sum of $81,719.61 was inchoate and uncertain in character and amount and had no appreciable value and concluded that the bankrupts were actually insolvent under the provisions of §67a of the Bankruptcy Act and voided the attachment and the subsequent judgment lien (Tr. of Rec. pp. 24-25).

Questions for the Appellate Court

Appellant concedes that upon evidence properly submitted a Referee in Bankruptcy may evaluate a chose in action at a figure less than that claimed by the bankrupt. Appellant insists, however, that it is incumbent upon the trustee in bankruptcy to present evidence and sustain its burden of proof as to the value of a chose in action.

The sole question submitted to this Court, therefore, is whether the Trustee in Bankruptcy sustained his burden of proving that the usury claim of $81,719.61 was inchoate and uncertain in character and had no appreciable value. It is the position of the appellant that the trustee in bankruptcy did not sustain his burden of proof and the petition should therefore be dismissed.

Point I

The Trustee in Bankruptcy Failed to Sustain the Burden of Proof that the Chose in Action Had No Value

At the hearing before the Hon. Joseph Rifkind, Referee in Bankruptcy, Grace Mahan testified that a cause of action was in existence on September 16th, 1953, against Seaboard Finance Company based on usury in the sum of $81,719.61 (Tr. of Rec. p. 36) and that in her opinion it was a valid and good cause of action as far as she and her husband were concerned (Tr. of Rec. pp. 42-43).

The trustee contends that since this claim against Seaboard is a lawsuit, its value as an asset should be discounted (Tr. of Record. p. 46). In thus arguing the trustee overlooks the fact that the burden of proof is upon him to establish that this claim has no value and not upon the petitioner to supply evidence as to the lawsuit's actual value. (*In re Graves,* 27 Fed. Supp. 717, 718; *Dockery v. Flanary,* (Sup. Ct. Va.) 73 S.E. 2d 375, 377; *Sample v. Jackson* (Sup. Ct. N.C.) 26 S.E. 2d 876, 879; *Moffit v. Dennitson,* (Sup. Ct. Iowa) 294 N.W. 731, 734).

The argument of the trustee that until a judgment has been rendered a cause of action has no value at all and that the court can entirely disregard it (Tr. of Rec. p. 46) is, of course, not correct. A judgment is merely the judicial determination of a claim by a court upon a matter within its jurisdiction (*U.S. v. Hark,* 320 U.S. 531, 534; 64 S. Ct. 359, 361). It is a matter of common knowledge that not all judgments are reducible to cash.

Equally well known is the axiom that a claim against a substantially solvent defendant has greater value than an uncollectable judgment.

In the case at bar the action had been pending prior to the levy of attachment (Tr. of Rec. p. 36). If at the date of the hearing, December 28, 1955, 2 years later (Tr. of Rec. p. 28) the litigation had not been tried and disposed of, the fault lies with the bankrupt and the trustee for not diligently prosecuting the same. No reason is given why those charged with pursuing the litigation did not do so with all haste and dispatch (Tr. of Rec. p. 47).

In determining the value of the chose in action we have only the testimony of Mrs. Mahan (Tr. of Rec. pp. 36, 42, 43) and the verified schedules that it was valued in the sum of $81,719.61 (Tr. of Rec. p. 7). (*In re Mandel,* 127 Fed. 863; affirmed 135 Fed. 1021). No testimony was introduced by the trustee as to any other valuation. The testimony of this witness is not so improbable that it cannot be accepted as evidence. In any event, it was uncontradicted and testimony not improbable and uncontradicted must be accepted as true by the court. (*Hynes v. White,* 47 Cal. App. 549, 552, [190 P. 836]; *Hutchison v. Holland,* 47 Cal. App. 710, 712, [190 P. 1072]; *Gomez v. Cecena,* 15 Cal. 2d 363, 366, [101 P. 2d 477]; *Mantonya v. Bratlie,* 33 Cal. 2d 120, 127, [199 P. 2d 677]; *Lee Sing Far v. U.S.,* 94 Fed. 834; Wigmore on Evidence, 2nd Edition, §2034. Under such circumstances the Court may not disregard such evidence. Furthermore there is *no* evidence upon which the referee could have made a contrary finding.

The cases cited by the Referee in its memorandum opinion (Tr. of Rec. p. 22) do not hold a contrary view, but actually support appellant's position that the *burden of proof* is upon the trustee to establish the value of a claim before the Referee can make a finding as to its worth.

In *First National Bank v. Wyoming Valley Ice Company* (Dist. Ct. Pa.) 136 Fed. 466, the respondent argued that certain bonds totaling $90,000.00 and set up as a liability were invalid; and that if you subtract this sum of $90,000.00 from the liabilities, the assets would exceed the liabilities and there would be no insolvency. The respondent insisted that these bonds were invalid because there was no compliance with certain state requirements. The court there held that the question of the irregularity was one that only the state authorities could take advantage of and as a result respondent failed to sustain the burden of proof that these bonds were invalid.

In *Houghton Wool Co. v. Morris* (C.C.A. 1) 249 Fed. 434, the Referee found that the bankrupt was insolvent, the court saying on page 435:

> "That there was sufficient evidence to support these findings is not disputed."

In Re Cooper, (Dist. Ct. Mass.) 12 Fed. 2d 485, involved a cause of action for breach of contract growing out of a transaction relating to reorganization of the bankrupt's business; that the agreement itself was for some indefinite undertaking to furnish financial

assistance. In this case the bankrupt himself admitted that the claim was not seriously considered by him (pp. 485-486). The court there said on page 486:

> "The test seems to be whether the claim is one that can be rendered available for the payment of debts within a reasonable time."

In the case at bar the only testimony is that Mrs. Mahan considered seriously this chose in action and felt that the Seaboard Finance Company was actually indebted to the bankrupt in the sum of $81,719.61 (Tr. of Rec. pp. 42-43). Moreover, it is because of the laches of the bankrupt and the trustee that this lawsuit was not tried long before the hearing of the petition. In the normal course of events the lawsuit would have been adjudicated and a determination had whether recovery on the claim would have rendered sufficient funds available for the payment of debts. As a matter of equitable principles the trustee in bankruptcy should not be permitted to remain idle more than two years and then without producing any evidence whatsoever argue that a chose in action is valueless.

Point II

The Order Granting the Petition that the Levy of Attachment Is Void and of No Effect Should Be Reversed.

Respectfully submitted,

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